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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73–1012

GULF OIL CORPORATION, ET AL., PETITIONERS

v.

COPP PAVING COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 487 F. 2d 202. The opinion of the district court (Pet. App. A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1973. The petition for a writ of certiorari was filed on December 28, 1973, and granted on March 25, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States will discuss the following question:

Whether the word "commerce" in the phrases "engaged in commerce" and "in the course of such commerce" in Sections 3 and 7 of the Clayton Act includes local activities which substantially affect interstate commerce.

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth at pp. 3–5 of the petitioners' brief on the merits.

INTEREST OF THE UNITED STATES

This case involves the application of Sections 3 and 7 of the Clayton Act, which prohibit certain exclusive dealing agreements and certain stock and asset acquisitions, respectively, to transactions involving firms which, although not themselves directly engaged in interstate commerce, provide products and services for firms that are engaged in such commerce. Two agencies of the United States, the Department of Justice and the Federal Trade Commission, have concurrent jurisdiction to enforce those provisions (see *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 694–695). There is pending before the Court a direct appeal by the United States from a district court judgment dismissing its civil suit challenging, under Section 7 of the Clayton Act, the acquisition of a firm not operating in the flow of interstate commerce but which performs services for firms that operate in

interstate commerce. *United States* v. *American Building Maintenance Industries,* No. 73-1689.

The decision of this Court in this private suit, presenting important questions concerning the reach of Sections 3 and 7 of the Clayton Act, will not only generally affect the government's enforcement of those sections, but is likely to have a significant impact upon the government's appeal in the *American Building* case.

Since the United States is concerned solely with the interpretation of the "commerce" requirements of Sections 3 and 7 of the Clayton Act, we express no views as to whether the transactions involved in this case are encompassed by Sections 3 and 7 as properly applied.

STATEMENT

A. THE PROCEEDINGS

The amended complaint in this civil antitrust suit, filed in the United States District Court for the Central District of California by respondents Copp Paving Company, Inc. ("Copp"), Copp Equipment Company, Inc., and Ernest A. Copp, against Gulf Oil Corporation ("Gulf"), Union Oil Company of California ("Union"), Edgington Oil Company ("Edgington"), Industrial Asphalt, Inc. ("Industrial"), and Sully-Miller Contracting Company ("Sully-Miller") (App. 13-24), alleged that the defendants violated Sections 1 and 2 of the Sherman Act, Section 2(a) of the Robinson-Patman Act, and Section 3 of the Clayton Act, 15 U.S.C. 14, in connection with the sale of liquid asphalt and asphaltic concrete (App.

13-24). The complaint also alleged that Gulf violated Section 7 of the Clayton Act by acquiring all the capital stock of Industrial and that Union violated Section 7 by acquiring Sully-Miller (App. 21).

The defendants moved for summary judgment in favor of Sully-Miller and to limit the issues as to the other defendants (App. 144-145). In response to that motion, the district court dismissed all claims against Sully-Miller and all claims against the other defendants under the Sherman Act, the Robinson-Patman Act and Section 3 of the Clayton Act involving the marketing of asphaltic concrete. It did not dismiss the claims under those provisions involving the marketing of liquid asphalt. The court also dismissed the Section 7 claim based on Union's acquisition of Sully-Miller, but not the Section 7 claim based on Gulf's acquisition of Industrial (Pet. App. 1-8).

On an interlocutory appeal, the Court of Appeals for the Ninth Circuit reversed the district court's partial summary judgment in favor of the defendants other than Sully-Miller, and reserved the judgment with respect to the final summary judgment in favor of Sully-Miller (Pet. App. 15).

B. THE COMPANIES INVOLVED

Gulf, Union and Edgington are petroleum refiners. They produce and sell a variety of petroleum products, including liquid asphalt. Union and Edgington produce liquid asphalt at refineries in California, which they sell in other western states (App. 72, 139). Gulf produces liquid asphalt at its Los Angeles refinery which it sells to Industrial, its wholly owned

subsidiary. Industrial apparently sells liquid asphalt purchased in California in other western states (App. 122–123). Union, Edgington, and Gulf are not directly engaged in the production of asphaltic concrete.

Copp, Industrial and Sully-Miller all produce asphaltic concrete (App. 51, 86–87, 117). Although the description of their business activities in the record and the opinions below is somewhat ambiguous, all three companies apparently are themselves paving contractors and also sell asphaltic concrete to other paving contractors (App. 51, 86–87, 117). Industrial also sells liquid asphalt (App. 122–123); Copp and Sully-Miller do not (App. 87).

Asphaltic concrete is produced at "hot plants" by combining liquid asphalt with aggregates and fillers at temperatures of approximately 375° F. It is delivered to the jobsites in dumptrucks and is placed at a temperature of about 275° F. The nature of the product limits deliveries to an area within about 35 miles of the hot plant (Pet. App. 3).

Copp operates one hot plant at Artesia, California, and its operations are largely confined to the Southern half of Los Angeles County (App. 53). Sully-Miller operates 11 hot plants in Los Angeles and Orange Counties (App. 90). Industrial apparently operates 55 hot plants in California, Arizona and Nevada (App. 180). Sully-Miller and Industrial both compete with Copp for asphaltic concrete business in the Los Angeles area (App. 87, 180).

The present location of the Copp and Sully-Miller hot plants precludes either company from delivering asphaltic concrete outside of the state of California

(App. 53, 90). Although Industrial's Nevada hot plant is apparently located within 35 miles of the Nevada-Arizona border and may be capable of producing asphaltic concrete for delivery in California, Industrial has stated, apparently without contradiction: "At no time has any of the asphaltic concrete produced at any of the hot plants owned and operated by Industrial in either California, Arizona or Nevada been sold or shipped outside the states in which the plants were located" (App. 117).[1]

C. THE SECTIONS 3 AND 7 CLAYTON ACT CLAIMS INVOLVED

1. *The Section 3 Claims.* The questions before this Court with respect to claims under Section 3 of the Clayton Act are limited to claims based on alleged Section 3 violations by Industrial in connection with the sale of asphaltic concrete. Section 3 prohibits sales or leases "on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller * * *," which have anticompetitive effects. Paragraph 19(h) of the amended complaint alleges that the defendants "[t]hreatened actual and potential customers of plaintiffs that unless they refrained from purchasing asphaltic concrete from plaintiffs in plaintiffs' area of competition, that said customers would be unable to obtain supplies of asphaltic concrete at a competitive price in

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[1] Industrial has acknowledged that it is engaged in interstate commerce in some of its operations (A. 118). It apparently purchases liquid asphalt in California which it resells in other states (A. 122–123).

other areas where said customers had no other source of supply other than defendants" (App. 20). This allegation apparently encompasses asphaltic concrete sales both in the Los Angeles area and at other unspecified locations, which were conditioned on the customers refraining from purchasing the product from Copp for use in the Los Angeles area.

2. *The Section 7 Claim.* Since the district court did not dismiss the respondents' claim based on the Gulf acquisition of Industrial, the only question before this Court with respect to Section 7 of the Clayton Act involves the allegation that Union violated that section by acquiring Sully-Miller. Section 7 prohibits certain acquisitions by a corporation "engaged in commerce" of the assets or stock "of another corporation engaged also in commerce * * *," which have anticompetitive effects.

D. THE OPINIONS BELOW

Neither the district court nor the court of appeals focused upon the specific language of Sections 3 and 7 of the Clayton Act defining the reach of the statute in relation to commerce. Instead, the district court concluded that the asphaltic concrete marketing activities of Industrial and Sully-Miller do not constitute commerce within the prohibition in Section 1 of the Sherman Act against conspiracies, combinations and contracts in restraint of "commerce" and then assumed that activities which do not constitute commerce under the Sherman Act similarly are not commerce under the Clayton Act. In reversing the dismissal of the Section 3 and Section 7 portions of the

complaint, the court of appeals noted that asphaltic concrete produced by Copp, Sully-Miller, and Industrial is used in the construction of interstate highways and held that "the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law" (Pet. App. 10).

ARGUMENT

INTRODUCTION AND SUMMARY

Statutory language delineating the reach of legislation regulating commerce requires particularized analysis. The words "commerce," "in commerce," and "interstate commerce," do not have a fixed meaning uniformly applicable whenever such words appear in statutory provisions. Rather, this Court stated in *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, 520–521:

> The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration.

The language, history and purpose of the Clayton Act demonstrate that in that Act Congress intended to exercise the full extent of its constitutional power to regulate commerce. Thus, the term "commerce" as used in that Act encompasses all activities properly

subject to federal regulation under the Commerce Power, *i.e.*, not only activities which are directly interstate in character but intrastate activities which have a substantial effect on interstate commerce.

The phrase "engaged in commerce," which appears in both Section 3 and Section 7, should be interpreted to mean engaged in commercial activities which are subject to congressional power. In the Sherman Act, Congress exercised to the utmost extent the federal power to regulate commerce. See *United States* v. *South-Eastern Underwriters Assoc.,* 322 U.S. 533. The draftsmen of the Clayton Act, who sought to extend the substantive prohibitions of the Sherman Act, did not intend the new legislation to have a narrower reach with respect to commerce than the earlier statute they were attempting to strengthen.

Although more recent cases, and some statutes, differentiate between activities which are in the flow of interstate commerce and intrastate activities which affect that commerce, that distinction should not be read into "engaged in commerce," which was used in the original Clayton Act in 1914. Nor should the meaning of this phrase in Section 7 be limited as a result of the 1950 amendments of that section. The 1950 Congress never focused on that phrase, and did not intend to constrict its meaning and scope.

Similarly, the phrase "in the course of such commerce" in Section 3 of the Clayton Act should be interpreted to mean in the course of activities which are subject to federal regulation. That interpretation is consistent with the purpose of and with past deci-

sions applying Section 3. The phrase was added to the statute to exclude coverage of activities which are not subject to federal regulation because they are inherently local and do not affect interstate commerce. Section 3 has been applied to prohibit exclusive dealing arrangements in connection with intrastate sales.

In Enacting The Clayton Act Congress Intended To Regulate Both Interstate Activities and Local Activities Having a Substantial Effect on Interstate Commerce

A. Section 7 Applies to Firms Engaged in Local Activities That Substantially Affect Commerce

1. Section 7 of the Clayton Act prohibits mergers or acquisitions which may have anticompetitive effects where both the acquired and acquiring firms are "en-engaged in commerce". The meaning of the phrase "engaged in commerce" is primarily derived from the definition of "commerce" in the Clayton Act and its legislative history.

Section 1 of the Clayton Act defines "commerce" as follows:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the

> **District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.**

This definition, which appeared in the original bill reported by the House Judiciary Committee in 1914,[2] used almost the precise words—"trade or commerce among the several States and with foreign nations"—which had been used in the Sherman Act.[3] It also broadened the definition to encompass commerce between insular possessions and territories. The legislative history of the Clayton Act confirms that by this broad definition of "commerce" Congress intended that the Clayton Act would reach all commerce to which the Sherman Act was applicable.

As the official title of the Clayton Act ("An Act to supplement existing laws against unlawful restraints and monopolies * * *," 38 Stat. 730) implies, Congress intended to extend the proscriptions of the antitrust laws to transactions and trade practices not covered by the Sherman Act. The Senate Report declared that the objective of the Act was (S. Rep. No. 698, 63d Cong., 2d Sess., 1):

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[2] The Senate added a proviso, "That nothing in this Act contained shall apply to the Philippine Islands." S. Rep. No. 698, 63d Cong., 2d Sess., 42–43. The definition section as amended has remained intact as 15 U.S.C. 12.

[3] Section 1 of the Sherman Act, 15 U.S.C. 1, declares that every contract, combination or conspiracy "in restraint of trade or commerce among the several States, or with foreign nations" is illegal, and Section 2, 15 U.S.C. 2, declares that persons who monopolize "any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

> * * * to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation. * * *

The arresting of the creation of trusts or monopolies in their incipiency was the fundamental principle underlying Section 8 of the Clayton bill (now Section 7 of the Act) and the House Report stated that that section was intended to eliminate the evil resulting from the aggregation of economic power through stock acquisitions "so far as it is possible to do so." See H. Rep. No. 627, 63d Cong., 2d Sess., 17.

This Court discussed the purposes of Section 7 as it read prior to the 1950 amendments in *United States* v. *E. I. DuPont De Nemours & Co.,* 353 U.S. 586, and observed (353 U.S. at 589):

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended.

The Clayton Act was a remedial statute designed to reach anticompetitive practices in their incipiency. It would have been anomalous for Congress to have sought to strengthen the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have restricted the jurisdictional scope of those remedial provisions. The Court of Appeals for the Third Circuit recognized this fact, in *Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163, certiorari denied, 346 U.S. 901, in holding that banking constituted "commerce" for purposes of the Clayton Act. Thus, the court stated (206 F. 2d at 166):

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

This conclusion is further supported by the 1950 amendments to the Clayton Act, which extended Section 7 to cover the acquisition of assets. Although the legislative history of the 1950 amendments did not deal directly with the "commerce" requirement, that

history reflects a continuing Congressional intent fully to exercise its regulatory powers.

In *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 315–323, this Court reviewed the 1950 legislative history and found that "[t]he dominant theme pervading congressional consideration * * * was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. In addition, the legislative history reflected congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.* at 315–316. Motivated by its concerns over increasing concentration, Congress sought to give "* * * courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318.

Acquisition of firms engaged in local activities may violate Section 7 if the effect of their acquisition may be substantially to lessen competition in relevant geographic and product markets. For example, a firm such as Union could obtain a virtual monopoly of an industry such as the asphaltic concrete industry, with significant interstate consequences, by acquiring one local firm after another across the country. Such a result would be contrary to the aim of Section 7, which was intended to block all acquisitions likely to contribute to increasing ievels of concentration. As the House Report to the 1950 amendment stated:

> Acquisitions * * * have a cumulative effect, and control of the market * * * may be achieved nbt in a single acquisition but as the result of a series of acquisitions. The bill is

> intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * *. [H. Rep. No. 1191, 81st Cong., 1st Sess., 8.]

2. In *United States* v. *South-Eastern Underwriters Assoc.,* 322 U.S. 533, this Court, in holding that the insurance business constituted "trade or commerce among the several states" under Section 1 of the Sherman Act, concluded (322 U.S. at 558) that "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *."

Consistent with that view, the Sherman Act has been broadly applied to many local activities which nevertheless substantially affect interstate commerce. See, *e.g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (agreement to fix price paid for California-grown sugar beets); *United States* v. *Frankfort Distilleries,* 324 U.S. 293 (agreement to fix local retail prices); *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (local advertising agreements used to injure competitor in interstate competition). As this Court stated in *United States* v. *Women's Sportswear Assn.,* 336 U.S. 460, 464:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not mat-

ter how local the operation which applies the squeeze.[4]

Since, as discussed earlier (pp. 11–12, *supra*), the Clayton Act was intended to supplement the Sherman Act by reaching anticompetitive practices before they matured into Sherman Act violations, Section 7 of the Clayton Act should also be construed as applying to firms engaged in local operations which substantially affect commerce. In attempting to strengthen the Sherman Act, Congress did not adopt a provision that had a lesser reach than the statute it was designed to bolster.

B. SECTION 3 APPLIES TO LOCAL TRANSACTIONS WHICH SUBSTANTIALLY AFFECT COMMERCE

The principles discussed above with respect to Section 7 are equally applicable to Section 3. As this

[4] *United States* v. *Yellow Cab Co.*, 332 U.S. 218, did not limit the Sherman Act to purely interstate activities. In that case this Court held that while a conspiracy among taxi cab companies to control the transportation of passengers between railroad stations in Chicago was within the reach of the Sherman Act (332 U.S. at 229), transportation of passengers to and from the stations to homes, offices, and hotels had only a "casual and incidental" relationship to interstate commerce (332 U.S. at 230–232). The Court noted that a traveler has complete freedom to arrange his transportation by several means of conveyance, of which taxi cab service is only one. The Court cautioned, however, that it was not "establish[ing] any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act. * * * All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation" (332 U.S. at 232–233).

Court stated in *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346, the Clayton Act was designed to supplement the Sherman Act and thus it "* * * sought to reach the agreements embraced within its sphere in their incipiency, and in [Section 3] to determine their legality by specific tests of its own which declared illegal [transactions] * * * which may 'substantially lessen competition or tend to create a monopoly.'" 258 U.S. at 356.

Section 3 of the Clayton Act prohibits any person "engaged in commerce" from engaging in certain transactions "in the course of such commerce." The words "such commerce" refer to the commerce in which the person in question is "engaged". Indeed, the legislative history confirms that the phrase was intended to have precisely this meaning.

The House version of Section 3 did not contain the "in the course of such commerce" phrase; it simply prohibited certain transactions by persons "engaged in commerce." Although the phrase "in the course of such commerce" which the conference committee added was not extensively discussed in the reports or debates, the remarks of Senator Walsh indicate that it was added to Section 3 to make clear that the section applied only to transactions which Congress could constitutionally regulate. See 51 Cong. Rec. 16115.

Senator Walsh's concern presumably arose from this Court's 1908 decision in the *First Employers' Liability Cases,* 207 U.S. 463. The original Employers Liability Act, 34 Stat. 232, imposed liability upon every common carrier "engaged in trade or commerce" between states to *any* employee injured by

reason of the negligence of any of the carrier's officers, agents or employees. This Court held the Act invalid because imposing liability in favor of any employee "without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." 207 U.S. at 498. Congress promptly enacted a new statute imposing liability upon such common carriers in favor of "any person suffering injury while he is employed by such carrier in such commerce." 35 Stat. 65. That statute was upheld in the *Second Employers' Liability Cases,* 223 U.S. 1.

Since the sole purpose of the "course of such commerce" limitation was to exclude transactions which are not subject to federal regulation, the phrase should not be interpreted to exclude transactions which are subject to that regulation. Accordingly, Section 3 of the Clayton Act is applicable to all tying arrangements and exclusive dealing contracts which substantially affect interstate commerce.[5]

C. THE PRINCIPLES OF *FEDERAL TRADE COMMISSION* V. *BUNTE BROS.*, 312 U.S. 349, ARE NOT APPLICABLE TO THE CLAYTON ACT

While petitioners concede that the commerce clause permits federal regulation of local activities substan-

[5] *Rosemound Sand and Gravel Co.* v. *Lambert Sand and Gravel Co.*, 469 F. 2d 416 (C.A. 5), does not support petitioners' contention that Section 3 is inapplicable to intrastate sales. Although the court of appeals stated that the absence of "interstate business" disposed of the Clayton and Robinson-Patman Act claims, the opinion does not describe the Clayton Act

tially affecting interstate commerce, they contend, relying on *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, that Congress must use explicit language indicating an intent to regulate such activities. Since the Clayton Act does not contain language such as "affecting commerce," petitioners argue that it must be construed as applying only to interstate activities (Pet. Brief, p. 38).

In *Bunte Bros.*, this Court held that the words "in commerce" in Section 5 of the Federal Trade Commission Act did not encompass local activities which substantially affect commerce. The decision was based on two grounds: (1) a restrictive principle of statutory construction derived from an examination of the commerce provisions in legislation enacted between 1935 and 1940, and (2) the Commission's own restrictive con-construction of the Act, reflected in its unsuccessful attempt in 1935 to obtain legislation extending the Act to local activities affecting commerce. Neither rationale may properly be applied to the Clayton Act.

1. The principle of statutory construction adopted in *Bunte Bros.* is of doubtful validity in light of this Court's subsequent decision in *South-Eastern Underwriters, supra.* The principle was based upon and reflected a method of legislative drafting which embodied contemporaneous judicial decisions re-

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claims and does not analyze the relevant statutory language or legislative history. Moreover, in *Rosemound* the court held that the defendant's activities did not affect commerce under the Sherman Act. Thus, the opinion does not hold that transactions which are within the Sherman Act because they "affect commerce" are not "in the course of such commerce" for purposes of Section 3 of the Clayton Act.

strictively construing the reach of the commerce clause.[6] It assumes that the Congress which wrote the Clayton Act in 1914 intended to freeze the reach of that Act "within the mold of then current judicial decisions defining the commerce power." *South-Eastern Underwriters, supra,* 322 U.S. at 557. This proposition was rejected in *South-Eastern Underwriters* with respect to the 1890 Congress which adopted the Sherman Act. It must also be rejected as applied to the 1914 Congress which passed the Clayton Act—a statute that was intended to broaden the earlier legislation.

Although Congress' power to regulate intrastate rail rates was affirmed in the *Shreveport Rate Cases,* 234 U.S. 342, decided in 1914, it is uncertain whether that decision was viewed as of general application or as a specialized rule applicable only to the regulation of transportation.[7] Indeed, although *Bunte Bros.* refers

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[6] The Court referred to the following provisions: The National Labor Relations Act, § 2(7), 9(c), 10(a), 29 U.S.C. 152(7), 159(c), 160(a), enacted in 1935; the Bituminous Coal Act, § 4-A, 15 U.S.C. (1940 ed.) 834, enacted in 1937; and a jurisdictional provision of the Federal Employers Liability Act, § 1, 45 U.S.C. 51, added in a 1939 amendment. It is likely that the drafting style used in these acts was a result of such decisions as *Schechter Poultry Corp.* v. *United States.* 295 U.S. 495, decided in 1935, which drew a sharp distinction between "flow of commerce" and "affecting commerce" jurisdiction.

[7] The significance of the *Shreveport Rate* decision was clouded by subsequent decisions such as *Hammer* v. *Dagenhart,* 247 U.S. 251, in which an act to prevent interstate commerce in the products of child labor was declared invalid on the ground that "* * * production of articles, intended for interstate commerce, is a matter of local regulation" (247 U.S. at 272). Although various decisions of this Court both before and after the *Shreveport Rate* case can be read as establishing

to the "Shreveport Doctrine" as being in existence in 1914, the Court declined to attribute it significance, noting that (312 U.S. at 353) "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

Even, however, if it is assumed that the power to regulate local matters affecting commerce was recognized in 1914, there is no suggestion in the *Shreveport Rate Cases* or any other decision of the time that particular language was necessary to exercise that power. Neither the congressional debates with respect to enactment of the Clayton Act nor the judicial opinions of that period indicate any disposition to draw a sharp line between interstate commerce and local activities which affect interstate commerce. On the contrary, judges and legislators of that era tended to equate "commerce among the states" with all commerce which is subject to federal regulation.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, Chief Justice Marshall said (9 Wheat. at 194): "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." The commerce "which concerns more States than one" includes all commerce within a state which affects interstate commerce. This Court adhered to that definition when the Clayton Act was passed.

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that the Commerce Clause extends to intrastate activities affecting interstate commerce, the issue was not definitely settled until the late 1930's and early 1940's in such decisions as *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, *United States* v. *Darby*, 312 U.S. 100, and *Wickard* v. *Filburn*, 317 U.S. 111.

In the *Second Employers' Liability Cases,* 223 U.S. 1, which was decided two years before the enactment of the Clayton Act, this Court said (*id.* at 46–47):

> The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

In the following year this Court said in the *Minnesota Rate Cases,* 230 U.S. 352, 398:

> The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.

The draftsmen of the Clayton Act were presumably aware of those decisions and undoubtedly assumed that using the phrase "among the several States" in their definition of commerce would be sufficient to include all commerce *except* "that commerce which is confined within one State and does not affect other States."

2. The second ground underlying *Bunte Bros.*—the agency's own restrictive interpretation of the statute and its unsuccessful legislative attempt to broaden the Act—is inapplicable to the Clayton Act. Neither the Department of Justice nor the Federal Trade Commission has interpreted the Clayton Act as inapplicable to local transactions affecting commerce, and neither has sought amendatory or clarifying leg-

islation dealing with the problem. The 1950 amendments, which dealt only with Section 7, did not focus on the commerce definition. Thus, contrary to petitioners' contention, those amendments cannot be read as reflecting a congressional intent that Section 7 be limited to interstate transactions (Pet. Brief, p. 38).[8]

Indeed, although the legislative history of the 1950 amendments contains no reference to the "engaged in commerce" phrase of Section 7, the discussion of the "any section of the country" language of that section is inconsistent with petitioners' contention. The Senate Report observed (S. Rep. No. 1775, 81st Cong., 2d Sess., 4):

> As the bill originally stood it was to be violated if, among other things, competition was substantially lessened "* * * in any community * * *" of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in

[8] In any event, this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, casts considerable doubt on the continued validity of these factors in statutory construction. There this Court, in holding Section 7 of the Clayton Act applicable to bank mergers, rejected the argument that the passage of the Bank Merger Act of 1960 and enforcement policies of the Justice Department indicated that Section 7 did not reach bank mergers. With respect to the passage of the Bank Merger Act, this Court observed that (374 U.S. at 348-349) "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Although the Justice Department had at one time held the view that Section 7 did not reach bank mergers, this Court found that view to be a misunderstanding of the scope of Section

a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.

Implicit in this analysis is the assumption that as originally drafted the bill covered such local mergers. If Congress had thought that the "engaged in commerce" language excluded mergers of local firms, there would have been no need to adopt the "section of the country" language in order to exclude mergers of minor impact. Therefore, to the extent that the 1950 Congress considered the "engaged in commerce" language, it must have assumed that it covered firms engaged in local activities which substantially affect interstate commerce. Any other assumption would have conflicted with the basic purposes of the 1950 amendments, which were designed to make Section 7 a more effective instrument for preventing anticompetitive mergers.

Finally, even assuming the validity of the explicit language principle of construction, *Bunte Bros.* recognizes that it is not an absolute requirement and that it should not be followed where "* * * the purpose of the Act would be defeated." 312 U.S. at 351. A restrictive interpretation of the Clayton Act "commerce" requirement would, as shown earlier (pp. 14–15, *supra*), frustrate the statutory purposes of the Act. Moreover, unlike Section 5 of the Federal Trade Commission Act, Sections 3 and 7 of the Clayton Act

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7, and as such not binding on the Court (374 U.S. at 349). See also *United States* v. *DuPont Co.*, 353 U.S. 586, *supra*, where this Court rejected the Federal Trade Commission's view that Section 7 of the Clayton Act did not apply to vertical acquisitions.

embody "relatively precise" (312 U.S. at 353) prohibitions and their enforcement is qualified by the requirement that the effect of transactions encompassed by those sections "may be to substantially lessen competition, or to tend to create a monopoly." Thus, the application of Sections 3 and 7 to local transactions substantially affecting commerce would not give a "* * * federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local laws" (312 U.S. at 354).

CONCLUSION

For the foregoing reasons, Sections 3 and 7 of the Clayton Act should be interpreted to apply to firms engaged in local activities which substantially affect interstate commerce.

Respectfully submitted.

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